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IN THE

Supreme Court of the United States

October Term, 1943.

No. 630

EDWARD G. BUDD MANUFACTURING COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, EDWARD G. BUDD MANUFACTURING COMPANY, (hereinafter called the Company), prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit, refusing to annul and ordering the enforcement of an order by the National Labor Relations Board (hereinafter called the Board). Said order required the Company to deny further recognition to Employees Representation Association (intervener in said case, hereinafter called the Association), which since March, 1934, has been recognized as the bargaining representative for all Petitioner's employees, and requiring Petitioner to reinstate two discharged employees with back pay.

Opinions Below.

The original opinion of the Circuit Court of Appeals (R. 1516a) is combined in 138 F. 2d 86 with the Court's supplemental opinion correcting the original opinion and denying petition for rehearing (R. 1539a), which latter opinion is not separately printed in the Federal Reporter. The findings of fact, conclusions of law and order of the Board (R. 1094a-1128a) are reported in 41 N. L. R. B. 872.

Jurisdiction.

The original opinion of the Circuit Court of Appeals was filed September 7, 1943; its supplemental opinion correcting that opinion and denying rehearing was filed October 25, 1943; its decree was entered on November 6, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

Questions Presented.

1. Whether there is substantial evidence to support the finding of the Board that the Company dominated, interfered with, and supported a labor organization of its employees, known as Employees Representation Association, in violation of the National Labor Relations Act (hereinafter referred to as the Act).

2. Whether, on this record, the Board was justified in ordering the disestablishment of the Association.

Questions subsidiary to the above are:

(a) Whether the assistance found to have been accorded by the Company to its employees to enable them,

on their own initiative, at their express request and prior to the Act, to choose representatives and to form an association for collective bargaining, so tainted the Association thus formed and chosen by them, as to render unlawful its continued recognition by the Company after the passage of the Wagner Act in 1935;

(b) Whether elections held in March, 1934, at the instance of and under directions prescribed by General Johnson, Director of the National Industrial Recovery Board, and of William H. Davis, Director of the Compliance Board thereof, between the Association formed by the employees and the Local of the American Federation of Labor, at which the employees voted in favor of the printed Plan which had been formulated by their representatives, removed any possible effect of the Company's prior assistance in the formation of the Association thus chosen by its employees;

(c) Whether facilities accorded by the Company to the Association subsequent to 1935, pursuant to and as a part of the collective bargaining agreements entered into with the Association as the accredited bargaining agent of the employees, constitute support prohibited by the Act.

3. Whether there is substantial evidence to support the finding of the Board that the Company discharged two of its employees in 1941 because of their membership and activity in the C. I. O.

Statutes Involved.

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix.

Statement.

The following is a concise summary of the undisputed facts on which the Board's disestablishment and reinstatement order was based:

In the fall of 1933, following the passage of the National Industrial Recovery Act of June 6, 1933, some of Petitioner's employees desired to form a labor organization for collective bargaining with the Company. Having been refused a charter by the American Federation of Labor, they decided to form an organization of their own (restricted to Petitioner's employees) and requested representatives of management to assist them in drawing up a plan of organization (modelled on those in effect in other automobile plants with which they were familiar) and in holding an election for representatives. Accordingly, pursuant to the employees' request and with the active cooperation and approval of their fellow-employee and spokesman Alminde, the management representatives drew up and had printed a plan of the type requested, and arranged for an election of 19 representatives, the Company paying the expense of printing the plan and holding the election. Following their election on September 7, 1933, the original 19 representatives organized, and they and their successors, all of whom were elected by secret ballot in admittedly fair elections, have bargained actively with the Company ever since.

There is no finding by the Board or by the Court and no testimony that the Company in any way coerced or *actually* dominated the employees in connection with the preparation of the plan or the conduct of the election; merely that the Company adopted a "most cooperative attitude" to them, "as was to be expected," its attitude

"being one of friendly interest," to enable them to exercise the right of self-organization and of collective bargaining through their selected representatives, which the N. I. R. A. accorded them. All that the Company did was to assist its employees, at their express request, in forming the kind of organization which they told the employer they wanted to have, and to furnish the assistance incident to the payment of the comparatively trifling expenses of printing the proposed Plan and of holding the election. In this respect this case differs materially from any case heretofore in this Court. While in the Board's opinion it refers to certain statements made by officers of the Company (when the employees' representatives were deliberating on the form of their organization) claimed by the Board to be coercive, these statements were not accompanied by any acts of discrimination or favoritism, and are no different from those which, in the *Virginia Electric Power* case, 314 U. S. 469, this Court held to be within an employer's constitutional right of free speech.

Following the election of representatives, the American Federation of Labor called an ineffective strike at the plant, to which but about 15% of the 5000 employees responded.

None of the employees responsible for or participating in this strike, were discharged or in any way discriminated against for their part in it.

Between November, 1933, and March, 1934, the Employee Representatives independently, without consultation with or advice from the Company, made a thorough revision of the proposed plan, in which revision they were advised and assisted by Wm. H. Davis, Chairman of the N. R.

A. Compliance Board. These changes included the elimination of certain provisions, contained in the originally proposed plan, which accorded management a voice in the Association. As revised by the Representatives and subsequently adopted by the employees, the Plan contained no feature which would have rendered it improper or unlawful had the Wagner Act of 1935 then been in effect.

After the completion of the revision, the revised plan was approved by Mr. Davis and was submitted, in printed form, to the employees. An election was then held under rules prescribed by Mr. Davis, under which the employees were given the choice between four alternatives:

> "1—Self organization through the plan of employee representation as proposed by the nineteen elected employee representatives.
>
> "2—Self organization through the United Automobile Workers Federal Labor Union #18763 of the American Federation of Labor.
>
> "3—Self organization through any other agency that you may designate.
>
> "4—No self organization."[1]

The employees, by a vote of 3152 to 1995, chose the revised plan as proposed by the 19 representatives.[2] The Company, at the employees' request, paid the expense of printing the ballots as well as that of the compensation of

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[1] R. 1271a, 1272a.

[2] In its original opinion the Court below stated that the 1934 plan had never been submitted directly to the rank and file membership for its approval or disapproval. (R. 1523a.) On petition (R. 1528a) the Court corrected this very serious factual error, (R. 1539a) recognizing that the election of March 9, 1934, was between the 1934 Plan as proposed by the Representatives and the A. F. of L.

independent tellers [3] for this election, which was held on Company property, the latter in accordance with Mr. Davis' directions. The Court below says: "We do not doubt that this election was conducted honestly."

Following the election of March 9, 1934, General Johnson, on complaint of the Federation that the 500 strikers had not been permitted to vote, held a second election outside the plant in order to give the Federation an opportunity to demonstrate that it had a majority. It boycotted the election and thereafter left the field to the Employees Representation Association, whose representatives have thereafter been recognized by the Company as the accredited bargaining agency of all its employees.

In connection with the two elections the Company posted notices, in the form prescribed by Mr. Davis and General Johnson, quoting Section 7 (a) of the National Industrial Recovery Act,[4] stating that the employees were

[3] For the Company to pay these expenses in no sense constituted "assistance" or support of the Employees Association, any more than of the A. F. of L. The Company was justified in making this small expenditure necessary to enable it to ascertain what organization, if any, was the accredited bargaining agent of its employees.

[4] "Section 7 (a) of the National Industrial Recovery Act provides:

'(1) That employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; (2) that no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing.'"

free to vote in the election without fear of discrimination. (R. pp. 1271a-1272a & 1276a.)

In connection with the second election General Johnson wrote and posted in the plant the following written statement (Rec. 1289a):

> "I think that Mr. Budd has acted in complete good faith; that Mr. Budd has attempted to comply with the law; that the present condition is due to a series of misunderstandings. I believe that there is the employee representation that a majority of the men now desire."

For more than seven years,—from March, 1934, until the filing of the present complaint by the C. I. O.,—the Employees Association and the Company have bargained together, unchallenged by anyone.

This bargaining on behalf of the representatives was so effective that, according to the uncontradicted testimony, the average hourly rate increased during the same period from 55¢ to 92.6¢, and the average annual earnings from $1,092.64 to $1,897.84 (Res. Ex. 25, R. p. 1355a). The annual wages increased from $3,588,213.40 in 1933 to $15,427,512.82 for the first fifty weeks of 1941, whereas the Company's total annual net earnings for the years 1933 to 1940 averaged but $132,832.25, a return of less than ½% on its $27,000,000 invested capital (Res. Exs. 23 & 24, R. pp. 1353a-1354a) and the Company did not declare a dividend on its preferred or common stock subsequent to 1930 (R. p. 783a).

Each year the employees elected their representatives, the Company paying none of the expenses thereof after 1934. The Representatives thereafter made some changes

in their plan, none of which were important. It is not found by the Board or contended that the Revised Plan of 1934 contained any provisions subsequently prohibited by the Wagner Act of July 5, 1935; merely that the Proposed Plan of September, 1933, contained such provisions, all of which were eliminated by the employees, either of their own accord or on Mr. Davis' advice, prior to the March, 1934, election, despite the suggestion by the Company, ignored by the Representatives, that certain of them be retained. (R. 31a, 163a.)

The collective bargaining agreements between the Company and the Association, renewed each year with negotiated changes, contained, in each case, agreements by the Company to accord the Association certain facilities. In addition to the conventional facilities relating to the use of bulletin boards, a place on Company property for meetings and elections, etc.,[5] the agreement with the Association of 1937 and subsequent years provided for a participation by the Association in the receipts of the Employees' Exchange, which provision was relied on both by the Board and by the Court as constituting improper support of the Association by the Company and involves an important question under the Act which has not yet been decided by this Court and which this record presents directly, without complications, as follows:—

Prior to 1931, in order to prevent the indiscriminate sale of inferior candy, cigarettes, etc., in the plant, the Company had granted an exclusive concession to make such

[5] The undisputed testimony showed (Resp. Ex. 39, Rec. p. 1371a) that the grant of such facilities was a normal part of the standard agreements with A. F. of L. and C. I. O.

sales to an association (which was incorporated in 1931), known as the Employees' Exchange, all the profits of which were by its charter devoted to accumulating a fund for making small loans to the employees. While supervisory employees were among the organizers of this Association and its officers, the Company had no possible participation in its profits. In 1937 one of the employee Representatives, who was also a trustee of the Employees Exchange, made the proposition that if the Employees Representation Association be given a share of the profits of the Exchange, it could and would stimulate the sales to an extent ample to justify this concession, and that unless this arrangement was made, the Association would boycott the Exchange. The Exchange agreed to this proposition and the Company acquiesced and continued the concession to the Exchange. The receipts from the Exchange actually increased in accordance with the Representative's assurances, and the Association's share was sufficient to cover the expenses of their elections, etc.

There is no question but that the agreement by the Company to the arrangement relative to the Exchange was part of its collective bargaining with the Association. The first reference to it is in the minutes of the collective bargaining between the Company and the Association in March, 1937, (Resp. Ex. 16, Rec. 1304a) (prior to the *Jones & Laughlin* decision of April 12, 1937). The question is accordingly presented to this Court for the first time as to whether, as part of a collective bargaining agreement between an employer and a labor union, the company may lawfully grant the union a concession to vend merchandise to its employees whereby the expenses of the Association are defrayed in whole or in part from the profits on sales to the employees themselves.

In connection with the reinstatement, with back pay, of the two discharged employees, it is and always has been the Company's position that as to one, Milton Davis, the record contains no testimony whatever to warrant a finding by the Board that the Company knew that Davis was a member of the C. I. O., from which it would follow that the Board was not justified in holding that the reason for Davis' discharge was his membership and activity in the C. I. O., in the face of the Company's positive testimony that he had been deficient in his duties.

As to the other discharged employee, Walter Wiegand, the only testimony in the record from which it could be inferred that the Company knew that Wiegand was a member of the C. I. O. was that quoted by the Court in the passage, which we have italicized, from the next to the last paragraph of the Court's opinion, (R. 1525a) as follows:

> "The petitioner contends that Weigand was discharged because of cumulative grievances against him. But about the time of the discharge it was suspected by some of the representatives that Weigand had joined the complaining CIO union. One of the representatives taxed him with this fact and Weigand offered to bet a hundred dollars that it could not be proved. On July 22, 1941 Weigand did disclose his union membership to the vice-chairman (Rattigan) of the Association and to another representative (Mullen) and apparently tried to persuade them to support the union. Weigand asserts that the next day he with Rattigan and Mullen, were seen talking to CIO organizer Reichwein on a street corner. *The following day, according to Weigand's testimony, Mullen came to Weigand at the plant and stated that Weigand, Rattigan and himself had been seen talking to Reichwein and that he, Mullen, had just had an interview with*

> *Personnel Director McIlvain and Plant Manager Mahan. According to Weigand, Mullen said to him, 'Maybe you didn't get me in a jam.' and 'We were seen down there.'* The following day Weigand was discharged."

Both the Board and the Court thus charged the Company with notice of Wiegand's C. I. O. affiliation solely on an inference from Wiegand's testimony that Mullen (another representative and not a Company supervisor) *had told* Wiegand that Wiegand had got him in a jam, and that he and Wiegand had been seen together.

Specification of Errors to Be Urged.

The Circuit Court of Appeals erred:

1. In holding that the following findings of the Board were supported by substantial evidence and were therefore conclusive under Section 10 (e) and (f) of the Act:

(a) that the Company dominated, interfered with and supported the Association in violation of Section 8 (2) of the Act;

(b) that the disestablishment of the Association will effectuate the policies of the Act;

(c) that the Company discharged Walter Wiegand because of his membership in and activity on behalf of the C. I. O.;

(d) that the Company discharged Milton Davis because of his membership in and activity on behalf of the C. I. O.;

(e) that the reinstatement of said Wiegand and/or Davis with or without back pay will effectuate the policies of the Act.

2. In holding that the principle of the *Newport News* (308 U. S. 241), *Link Belt* (311 U. S. 584), and similar decisions of this Court, requiring a "cleavage" or "wiping of the slate clean" after 1935 in the case of unions admittedly organized and actually dominated by the Company prior to 1935, applies to cases such as the instant case, where there was no actual domination but merely assistance and support furnished prior to 1935 at the employees' express request, which assistance or support was withdrawn prior to the passage of the Wagner Act.

3. In holding that if any such "cleavage" was necessary it was not accomplished by the elections of March 9, and March 20, 1934.

4. In holding that facilities furnished by an employer as the result of collective bargaining and as a part of the collective bargaining agreement to and with a labor organization which constituted the exclusive bargaining agency of its employees, constitute "support" or "assistance" forbidden by the Act.

Reasons for the Granting of the Writ.

The Circuit Court of Appeals has in sustaining the disestablishment of the Association erroneously decided five important questions of Federal law which have not been but should be settled by this Court. These five questions, covered by the specifications of error above set out, are more fully stated and explained in the following brief.

In sustaining the two discharges the Circuit Court of Appeals has decided a Federal question contrary to the applicable decisions of this Court, and has departed from the accepted and usual course of judicial proceedings.

WHEREFORE, your Petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Third Circuit, sitting at Philadelphia, Pennsylvania, commanding that Court to certify and to send to this Court on a day certain to be therein named, a full and complete transcript of the record and all proceedings had in this case numbered and entitled on its docket 8054 to the end that this case may be reviewed and determined by this Court; that the said judgment of the United States Circuit Court of Appeals for the Third Circuit may be re-

versed by this Court; and that your Petitioner may have such other and further relief in the premises as may seem just and proper.

And your Petitioner will ever pray, etc.

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